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Nos. 99-29 & 99-5

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTY BRZONKALA,
Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Martha F. Davis*
Julie Goldscheid
NOW LEGAL DEFENSE AND EDUCATION FUND
395 Hudson Street, 5th floor
New York, New York 10014
(212) 925-6635

Eileen N. Wagner
4906 Fitzhugh Avenue
Suite 201
Richmond, Virginia 23230
(804) 359-1169

Carter G. Phillips
Richard D. Bernstein
Katherine Adams
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

*** *Counsel of Record***

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INTRODUCTION

It is surprising and disappointing that, rather than defend key elements of the decision below and acknowledge that there is material disagreement among the United States courts of appeal concerning the proper interpretation and application of *United States* v. *Lopez*, 514 U.S. 549 (1995) (conflicts that respondents' own ideological *amici* Pacific Legal Foundation recognize as supporting *certiorari*), respondents have resorted to *ad hominem* attacks on the petitioner and the United States. We feel it incumbent to respond to respondents' suggestions of impropriety so that they will not have the effect

(intended or otherwise) of misdirecting this Court's attention from the significant differences between the Fourth Circuit's interpretation of *Lopez* in *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir. 1999) (*en banc*), assessing the constitutionality of the Civil Rights Remedy of the Violence Against Women Act, 42 U.S.C. § 13981 (1999) (the "VAWA civil remedy"), and the approach taken by other circuits in assessing the constitutionality of other acts of Congress. We address respondents' arguments briefly below.

ARGUMENT

I. The Fourth Circuit's Invalidation Of The VAWA Civil Remedy Is A Proper Basis For Granting *Certiorari*.

Respondents do not dispute (nor could they) that it is within this Court's power to grant review. *See* Sup. Ct. R. 10(c). Rather, respondents assert (without citation) that "[w]hen a federal statute is declared unconstitutional, this Court has historically required the presence of other factors" supporting review. Opp. 19. We are aware of no authority that supports this proposition. Indeed, as explained in Christy Brzonkala's Petition for Writ of Certiorari ("Petition"), this Court long has recognized that when a federal court of appeals holds a federal statute unconstitutional, the federal court has exercised a "grave power," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), and *certiorari* to review that decision is proper. Pet. 11-12. Were additional factors required, the disagreement among the circuits about how to interpret key provisions of *Lopez* provides ample additional justification for review.

Respondents also assert that this Court has, in other cases, denied review when courts of appeal have declared statutes unconstitutional. Opp. 18. The mere fact that the

Court exercised its discretion to deny review in those cases in no way requires the Court to deny *certiorari* here. In addition, as more fully set forth in the Reply Brief of the United States, the decisions respondents cite either involved already settled legal issues, unusual factual circumstances with little practical significance or as-applied challenges, each of which contrasts sharply with the facial challenge here, Pet. 17, and the decision below, which struck down the VAWA civil remedy in its totality. *See* Reply Br. of United States.

None of the cited instances in which this Court denied *certiorari* denigrate the basic principle that the striking of a federal statute is a "grave" act, *Gainey*, 380 U.S. at 65, which justifies this Court's review. This point is further supported by the fact that the Fourth Circuit's decision rested on a Commerce Clause analysis and interpretation of *Lopez* that is the subject of disagreement and inconsistencies among the circuits, raising "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).[1]

II. The Circuit Splits Concerning The Proper Interpretation And Application Of *Lopez* Warrant This Court's Review.

Respondents misleadingly imply that the Petition asserts a circuit split on the constitutionality of the VAWA civil

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[1] Respondents' assertion that Brzonkala should have sought *certiorari* sometime during the appellate process, Opp. 9, is mystifying. There is no requirement that petitioners pursue *certiorari* at the earliest point possible. Moreover, until the Fourth Circuit issued its *en banc* decision, Brzonkala had no reason to seek *certiorari*, since the original panel reversed the district court's dismissal of her complaint.

remedy. Opp. 26. The Petition makes clear that there is no circuit split on this issue. Pet. 12. Rather, the Petition asserts that the decision below brings into focus conflicts among the circuits concerning the interpretation and application of an important decision of this Court, *Lopez*. Pet. 13. These conflicts constitute a customary and compelling reason for this Court to exercise its discretionary authority to review. *Id.*

Respondents contend that petitioner has "fabricated" a disagreement among the circuits by critiquing Brzonkala's analysis of the Fourth Circuit decision. Opp. 26-30. Glaringly absent is authority showing that the circuits consistently apply *Lopez*. Instead, respondents offer their own interpretation of the Fourth Circuit decision, which confirms the need for this Court's review.

First, respondents claim that the Fourth Circuit's rule that Congress cannot regulate non-economic activity absent an interstate nexus was "unnecessary" to its decision. Opp. 27. This is a misreading of the Fourth Circuit's opinion, which squarely held that, since the VAWA civil remedy "neither regulates an economic activity nor contains a jurisdictional element . . . it cannot be sustained" under the Commerce Clause. App. 23a-24a. *Accord* App. 21a-22a, 27a-29a, 31a, 39a-40a. This was the key ground on which the court determined that the VAWA civil remedy was unconstitutional and clearly constitutes a holding subject to this court's review. The Fourth Circuit's opinion thus creates a split among the circuits evinced by the post-*Lopez* opinions the Petition cites. Pet. 13-17.[2] Indeed, the states themselves have asked for this

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[2] In a lengthy but flatly incorrect footnote, respondents charge that Brzonkala disingenuously cites *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert.*

Court's resolution of these conflicts to "provide guidance for Congress and the States in their future efforts to resolve national problems cooperatively." Brief *Amici Curiae* of 33 Attorneys General in Support of Petitioner ("Brief of 33 Attorneys General") at 3.

Employing contorted logic, respondents describe the circuit splits as merely differences in how the circuits define economic activity. Opp. 27-28. Yet that very argument concedes confusion among the circuits about how to interpret *Lopez* because it illustrates the difficulties courts have in determining what constitutes "economic activity" under *Lopez*. Further, respondents maintain that the circuit split is "contrived" because the circuits would reach the same result in a particular case notwithstanding their differing constructions of what constitutes "economic" activity. Opp. 27. This case illustrates the fallacy of that position. Respondents' actions forced Brzonkala to end a financial relationship in which she paid tuition to Virginia Tech. Pet. 17-18 n.14. That is certainly a sufficient "economic" connection under the approach, for example, of the Fifth Circuit or the District of Columbia Circuit, which recognize the substantial affect on interstate commerce of non-commercial intrastate activities. *See, e.g., United States v. Bird*, 124 F.3d 667, 675-76 (5th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998); *Terry v. Reno*, 101 F.3d 1412, 1417 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997).

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denied, 118 S. Ct. 2340 (1998). Opp. 28 n.9. Contrary to respondents' charge, the Petition identified Judge Wald's opinion as a single-judge opinion, and explained that Judge Henderson's concurrence was fully consistent with Judge Wald's opinion on all material points for which it was cited. *See* Pet.14 & n.12.

Second, respondents deny that the Fourth Circuit adopted a *per se* rule that intrastate non-commercial conduct that has an indirect effect on interstate commerce cannot substantially affect commerce. Opp. 28-29. This is a clear misreading of the Fourth Circuit's decision, which states that the "attenuated and indirect relationship with interstate commerce" asserted here exceeds Congress' commerce clause authority. App. 51a. The court goes on to criticize Brzonkala's assertion "that the relationship described by [the congressional findings supporting the Act] is direct," stating "it quite simply is not" and finding that "such an attenuated relationship with interstate commerce" is insufficient to withstand constitutional scrutiny. App. 69a-70a. *Accord* App. 64a-68a. This simplistic analysis is at odds with *Lopez*, which eschewed any bright-line test of constitutionality, noting that "[t]hese are not precise formulations, and in the nature of things they cannot be." *Lopez*, 514 U.S. at 567. Similarly, Justice Kennedy's *Lopez* concurrence -- which respondents completely ignore -- amplifies that the Commerce Clause "is not susceptible to the mechanical application of bright and clear lines" and reaffirms "the Court's definitive commitment to the practical conception of the commerce power." *Id.* at 579, 573.

Assuming, arguendo, that respondents' reinterpretation of the Fourth Circuit's decision was correct, the need for review by this Court would still be compelling because respondents essentially deny that the Fourth Circuit adopted any discernible principles in reaching its conclusion that the VAWA civil remedy is unconstitutional. Respondents' primary response to the conflicts the decision below creates is that the Fourth Circuit did not rely on the principles: (1) that "Congress cannot regulate non-economic activity with no interstate nexus"; (2) that there is a "bright line between direct and indirect effects" on interstate commerce; or (3) that an act of Congress may not "intrude upon traditional state concerns." *See* Opp. 26, 28-29.

Respondents are simply wrong. *See, e.g.*, App. 48a-51a, 64a-68a, 69a-70a, 73a-76a. Moreover, if the decision truly lacked those rationales, it would be virtually untethered from any analytic principles, which clearly would warrant this Court's review.

Finally, respondents' contention that Brzonkala fabricated a tension between the decision below and numerous other circuits that uphold Congress' Section 5 power to regulate unconstitutional conduct, Opp. 30, is simply unfounded. Pet. 26-28. By limiting Section 5 laws to those that provide redress against states or state actors, the Fourth Circuit's reasoning conflicts with this Court's decisions upholding Congress' Section 5 power to regulate private conduct. *See, e.g., District of Columbia v. Carter*, 409 U.S. 418, 424 n.8 (1973); *United States v. Guest*, 383 U.S. 745, 762 (1966) (Clark, J., concurring, joined by Justices Black, Fortas), *id.* at 777 (Brennan, J., concurring, joined by Chief Justice Warren, Justice Douglas); *cf. Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966). Because the lower court eliminated an entire category of conduct that could fall within the scope of Congress' Section 5 power, the Petition accurately characterized it as "in tension" with the many circuit courts that, while not themselves addressing Congress' authority to regulate private conduct, plainly uphold Congress' authority to regulate conduct that is not constitutionally proscribed. Pet. 27 n.18.

III. Respondents Misread *Lopez* And Ignore The Vital Distinctions Between *Lopez* And This Case.

Respondents characterize the Fourth Circuit decision as a simple application of *Lopez* and maintain that the decision below correctly resolved the issues *Lopez* considered. Opp. 20-26. Respondents' arguments fail to address both: (a) important

issues left open by *Lopez*, which have resulted in inconsistent decisions among the lower courts; and (b) the principled limitations on Congress' commerce power proposed in the Petition. The Brief of 33 Attorneys General seeking this Court's clarification highlights the importance of addressing this confusion in the lower courts. Brief of 33 Attorneys General at 3.

First, respondents suggest that *Lopez* precludes Congress from regulating non-economic activity unrelated to any comprehensive scheme of commercial regulation, and criticize both the United States and Brzonkala for not explaining "how the non-economic nature of the activity should be considered in any analysis under the Commerce Clause." Opp. 20. Yet respondents fail to establish why petitioners should have provided any such explanation. It is abundantly clear that *Lopez* restates the traditional test that "Congress' commerce authority includes the power to regulate those activities [that substantially affect] interstate commerce." *Lopez*, 514 U.S. at 558-59. Under that test, "[i]t is the effect upon interstate commerce . . . , not the source of the injury which is the criterion of Congressional power." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942), *quoted in* Pet. 19. As discussed above, the Fourth Circuit just as clearly held that the VAWA civil remedy was unconstitutional because the source of the injury -- the physical attack -- was not an economic activity, and there was no jurisdictional element. App. 23a-24a. Respondents' attempt to reconcile the decisions on this point is unavailing.

Second, respondents criticize the Petition for failing to propose any meaningful limitations on Congress' commerce power. Opp. 22-24. But the Petition sets forth precisely such limitations. As explained at length, Pet. 10, 18-26, the following vital distinctions between this case and *Lopez*

support upholding the VAWA civil remedy while preserving principled limitations on the commerce power: (1) in enacting the VAWA civil remedy, Congress made extensive and reasonable findings in support of the exercise of its delegated power; (2) the VAWA civil remedy is not a criminal statute and addresses an area the states recognize that they "cannot address . . . adequately by themselves," Brief of 33 Attorneys General at 1; *see also id.* at 3-4; Pet. 6-7 (citing *Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 34-36 (1993)) (Letter from Attorneys General); and (3) because the VAWA civil remedy is anti-discrimination legislation that seeks to remove documented and persistent intrastate barriers to the participation of specific groups in interstate commerce and the national economy, it falls within the commerce power as interpreted by this Court in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-53, 257, 260-61 (1964), and *Katzenbach* v. *McClung*, 379 U.S. 294, 300, 302, 304 (1964). *See* Pet. 10, 18-26.

Finally, respondents' contentions concerning Section 5 are unavailing in several respects. While more germane to the merits of the case than this Petition, respondents' argument that Brzonkala presents no evidence that Congress enacted the VAWA civil remedy to remedy Equal Protection violations, Opp. 25, ignores the legislative record addressing that concern. *See, e.g.*, Pet. 5-6 (documenting legislative record). Moreover, that the VAWA civil remedy fails to provide an antidote to every problem with judicial administration documented by Congress, Opp. 25-26, supports rather than detracts from the law's constitutionality because it demonstrates Congress' intent to craft a narrow remedy that avoids the federalism concerns about which respondents complain. Pet. 22-23. *See, e.g.*, *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (distinguishing constitutional civil rights law requiring proof of

discriminatory intent analogous to that required by the VAWA civil remedy from general federal tort law).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Martha F. Davis*
Julie Goldscheid
NOW LEGAL DEFENSE
AND EDUCATION FUND
395 Hudson Street, 5th floor
New York, New York 10014
(212) 925-6635

Eileen N. Wagner
4906 Fitzhugh Avenue
Suite 201
Richmond, Virginia 23230
(804) 359-1169

Carter G. Phillips
Richard D. Bernstein
Katherine Adams
SIDLEY & AUSTIN
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Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* *Counsel of Record*

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